

**MAYER, BROWN & PLATT**

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US EPA RECORDS CENTER REGION 5



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February 6, 2001

**VIA FACSIMILE**

**Brad Stimple**  
U.S. Environmental Protection Agency  
Region V - SE-5J  
77 West Jackson Boulevard  
Chicago, IL 60604

Re: Freedom of Information Requests Relating to Nicor Submissions

Dear Mr. Stimple:

We have been informed that a Freedom of Information Act request may have been filed with your office requesting copies of any and all submissions from Nicor related to mercury issues. Nicor strongly objects to disclosing private or trade-secret information. Clearly, since there is a pending lawsuit, the exemption contained in 5 ILCS 140/7(c) would apply. Additionally, as you may already be aware, Nicor has previously objected to disclosure of customer information, including the documentation containing customer names and addresses. Attached for your information is a copy of a sample letter that Nicor has sent to a number of municipalities. To date, these municipalities have retained the information as confidential.

Sincerely,

Mark R. Ter Molen

MRT/jt  
Attachment

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Re: Public Release Of Nicor Customer Names And Addresses

Dear \_\_\_\_\_:

I understand that you have received a Freedom of Information Act request from a newspaper that asks for the names and addresses of Nicor customers in the area who's homes may at one time have had natural gas delivery equipment that contained mercury. The newspaper's apparent goal is to publish these names and addresses.

Nicor and its customers object to the release of this private information. The possible presence of mercury is not the fault of the customers, and they have not asked to have their names and addresses published -- to the contrary, they are very concerned about publication.

Other public agencies to whom the information has been disclosed have agreed to keep the information confidential, including the Illinois Attorney General's Office, the United States Environmental Protection Agency, the Illinois Environmental Protection Agency, and the States Attorneys of Cook, DuPage, and Will counties.

Releasing this identifying information will expose Nicor customers to potential harassment and endanger the cooperation that Nicor requires to complete its mercury inspection program. As you may know, in some localities individuals posing as "mercury inspectors" have gained entry to homes. Other scam artists have attempted to sell "mercury insurance."

Nicor's mercury inspection program requires cooperation from residents. To determine whether mercury may be present, Nicor representatives must in most cases go inside a home. Publication of names and addresses, with the resultant likely fear of harassment, will only endanger the cooperation that Nicor must have to complete its inspections.

Perhaps not surprisingly, as a legal matter, the Freedom of Information Act (set forth in 5 ILCS 140/1 *et seq.*) specifically provides for protecting this kind of private information from disclosure. The statute specifically states that it: "is not intended to be used to violate individual privacy, nor for the purpose of furthering a commercial enterprise." 5 ILCS 140/1. Indeed, the General Assembly created an explicit exemption from the statute's disclosure requirement for information the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 ILCS 140/7(b) (West 2000).

CHICAGO BERLIN CHARLOTTE COLOGNE HOUSTON LONDON LOS ANGELES NEW YORK WASHINGTON  
INDEPENDENT MEXICO CITY CORRESPONDENT: JAUREGUI, NAVARRETE, NADER Y ROJAS  
INDEPENDENT PARIS CORRESPONDENT: LAMBERT & LEE

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Illinois, like the federal legislature and the federal courts which have interpreted the federal FOIA law, has long recognized that personal information about individuals, including their names, addresses, and telephone numbers, is private information which warrants protection, even standing alone. See, e.g., *Gihson v. Illinois State Board of Education*, 683 N.E.2d 894, 899-900 (1<sup>st</sup> Dist. 1997) (disclosure to the press of the identity of individuals who had received legislative scholarships inappropriate because the information was "intensely 'confidential' and 'private'"); *Blumenfield v. Dept. of Professional Regulation*, 636 N.E.2d 594, 599 (1<sup>st</sup> Dist. 1993) (disclosure of the names of individuals who had received notices of professional disciplinary notices from the Dept. of Professional Regulation improper); *CBS, Inc. v. Parlee*, 556 N.E.2d at 653 (disclosure of the race of Assistant State's Attorneys constituted a clearly unwarranted invasion of privacy). Indeed, few things pertain to an individual in which his privacy has traditionally been more respected than his own home, and the "the ancient concept that a 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." See *Wine Hobby USA, Inc. v. U.S. I.R.S.*, 502 F.2d 133, 136-37 (3d Cir. 1974).

Moreover, release of the customer names and addresses would do nothing to serve the Act's purpose of enlightening the public regarding the affairs of government and the official acts and policies of those who represent them, since the information sought is nothing more than a list containing the identities and locations of Nicor customers. In light of this fact, it should come as no surprise that the U.S. Supreme Court in analogous circumstances has never "found it appropriate to release, in response to a FOIA request, information about a particular private citizen." *United States Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 774-775 (1988); see also, *United States Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 497-502 (1994) (union not entitled to names and addresses of FLRA employees); *U.S. Dept. of State v. Ray*, 502 U.S. 164, 175 (1991); *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355, 356 (1997) (environmental group not entitled to names and addresses of individuals receiving a Bureau of Land Management newsletter); see also, *Halloran v. Veterans Admin.*, 874 F.2d 315 324 (5<sup>th</sup> Cir. 1989); *Minnis v. USDA*, 737 F.2d 784 (9<sup>th</sup> Cir. 1984); *Abraham & Rose v. United States*, 138 F.3d 1074, 1083 (6<sup>th</sup> Cir. 1998); *Schrecker v. U.S. Dept. of Justice*, 74 F. Supp. 2d 26 (D. D.C. November 29, 1999); *Campaign for Family Farms v. Glickman*, 200 F.3d 1180 (8<sup>th</sup> Cir. 2000) (lower federal decisions reaching same result).

If journalists or other parties are genuinely interested in learning more about the status of the mercury issue, there is a great deal of publicly available information which does not violate the fundamental privacy rights of individual customers. For example, Nicor has created a special internet webpage which provides current information regarding the number of homes being investigated, the number of homes at which mercury has been identified, the status of cleanups performed, and a list of towns with homes and business which will be inspected. See <<<http://www.nicorinc.com/gas/mercury.htm>>>. Comparable materials, including information which *actually* describes the activities of State government (as opposed to providing personal information about private parties) is readily available from the Illinois Environmental Protection

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Agency and the Illinois Department of Public Health. See e.g., <<<http://www.epa.state.il.us/>>>; <<<http://www.idph.state.il.us/>>>.

In addition to the privacy exemption, Nicor also objects to disclosure on the following grounds:

- First, these are the names and addresses of Nicor's customers, and customer lists do qualify as trade secret or commercial information, which are exempted from disclosure pursuant to 5 ILCS 140/7(g).
- Second, the address information was compiled pursuant to specific order of the Illinois Attorney General and the States Attorneys of Cook, DuPage, and Will counties in the litigation that they have initiated against Nicor, People of the State of Illinois v. Nicor, Inc., et al. Case No. 00 CH 12962 (Cook County, Chancery Division). Indeed, Nicor's ongoing mercury inspection and cleanup program is being conducted pursuant to orders entered in the same action. Therefore, the exemption contained in 5 ILCS 140/7(c), exempting from disclosure information generated as part of an ongoing investigation, also applies here. Not only was the customer list at issue generated specifically as part of this investigation, but publication of the names and addresses may actually hamper the investigation through decreasing the willingness of potentially affected homeowners to allow Nicor inspectors into their homes.
- Third, Section 5-108 of the Public Utilities Act, which is incorporated into the Freedom of Information Act exemptions via 5 ILCS 140/7(y), makes it a misdemeanor for a utility employee to disclose information generated in the course of an investigation.

For all of these reasons, Nicor respectfully requests that you either deny the Freedom of Information Act request in its entirety or redact the names and addresses and any other identifying information to protect the privacy interests of Nicor customers. I appreciate your consideration and would ask that you call me if you have any questions regarding this matter.

Sincerely,

Mark R. Ter Molen